

## **ORDINANCE 15-11, Civil Penalties**

Ordinance Amendment Report

PC Meeting Date: October 15, 2015



### **Executive Summary**

**AN ORDINANCE** to amend the Hanover County Code, Chapter 26, Zoning Ordinance, by amending Sections 26-347, 26-348, and 26-349, and by relocating the provisions of current Section 26-349 into a new Section numbered 26-350, to provide that violations of the Hanover County Zoning Ordinance shall be punished by a civil penalty, in accordance with the following:

1. The amount of the Civil Penalty shall be Two Hundred Dollars (\$200.00) for an initial violation and Five Hundred Dollars (\$500.00) for subsequent violations,
2. Civil Penalties shall not be used for violations that:
  - a. Result in injury to any person,
  - b. Are for activities related to land development, or
  - c. Are related to the posting of signs on public property or public rights-of-way.
3. Civil Penalties shall be in lieu of Criminal Penalties, except for those violations which are listed above as exempt from Civil Penalties and in those situations where the amount of Civil Penalties for a repeated violation exceed Five Thousand Dollars (\$5,000.00).

### **Board Authorization**

At their meeting of September 9, 2015, the Board of Supervisors authorized the Planning Commission to hold a public hearing on Ordinance Amendment 15-11, Civil Penalties.

### **Staff's Recommendation**

The draft Ordinance is attached for the Planning Commission's consideration of the requested amendment. Staff recommends the Planning Commission forward Ord. 15-11, Civil Penalties to the Board of Supervisors with a recommendation of **ADOPTION**.

As part of the ongoing review of the enforcement of the provisions of the Hanover County Zoning Ordinance (“the Zoning Ordinance”), the County Attorney’s Office and the Planning Department are recommending the adoption of civil penalties for violations of the Zoning Ordinance to largely replace the current approach which treats all zoning violations as criminal misdemeanors.

### **Statutory Authority**

Chapter 22 of Title 15.2 of the Code of Virginia authorizes localities throughout Virginia to adopt zoning ordinances and to enforce the provisions of those ordinances. Section 15.2-2286 of the Code of Virginia, which governs the general provisions of zoning ordinances, provides that violations of a zoning ordinance are generally to be treated as a misdemeanor punishable by a fine of not less than \$10 nor more than \$1,000, that the court shall order any violations to be abated within a specific time, and that subsequent convictions shall be subject to the same penalties.

The Zoning Ordinance contains provisions that exercise the authority granted by Section 15.2-2286 of the Code of Virginia and, with very limited exceptions, all zoning violations are criminal matters.

In addition to the authority granted by Section 15.2-2286 of the Code of Virginia which provides for criminal penalties, Section 15.2-2209 of the Code of Virginia provides that localities may choose to provide for civil penalties for violations of a local zoning ordinance. Section 15.2-2209 provides that a locality can establish “a uniform schedule of civil penalties for violations of specified provisions of the zoning ordinance.” Section 15.2-2209 provides that civil penalties are not available for a zoning violation which results in an injury to any person, for activities related to land development, or for violations of any provision of a local zoning ordinance relating to the posting of signs on public property or public rights-of-way.

Section 15.2-2209 provides that a local governing body shall establish the civil penalties for zoning violations, with the limitation that the penalty for any one violation shall not be more than \$200 for the initial summons and not more than \$500 for each additional summons. In addition, a series of violations arising from the same operative set of facts are not permitted to exceed a total of \$5,000. Each day during which the violation is found to have existed shall constitute a separate offense, but an individual generally may not be charged more frequently than once in any 10-day period for a single violation.

Section 15.2-2209 provides that once a locality adopts a civil penalty for a violation, the locality may not seek criminal penalties against the violator except where civil penalties imposed against an individual have totaled \$5,000 or more.

### **Analysis**

Staff has reviewed the probable consequences of a switch from a criminal-penalty-based enforcement approach to a process that begins with civil penalties, and has determined that the following observations are important to consider:

1. The Notice of Violation process will largely remain the same, except that it is anticipated that there is likely to be an increased use of form documents that will notify the alleged violator of the nature of the violation, the date by which the violation is to be corrected, and the potential imposition of civil penalties if the violation is not corrected in a timely manner.
2. One of the shortcomings of the current system is that it often results in a duplication of procedures and confusion to all the parties involved. For example, under the Code of Virginia an alleged zoning violator has the right to appeal the issuance of a Notice of Violation to the local board of zoning appeals. The board of zoning appeals is charged with considering the appeal, receiving appropriate public comment, and making a decision on the appropriateness of the issuance of the NOV. Should the board of zoning appeals uphold the issuance of the NOV (in essence, finding that the zoning violation exists), the zoning administrator must still commence a criminal prosecution in General District Court. At the trial before the General District Court, the defendant is able to raise any and all defenses to the charge, even if the board of zoning appeals has already heard and considered the identical arguments and evidence. This results in the board of zoning appeals' action being largely a nullity, since it has no binding effect on the parties, and results in a delay in enforcement as the Code of Virginia provides that, once an appeal is filed with the board of zoning appeals, any criminal prosecutions must be stayed until the board of zoning appeals issues its decision. This can often add months to the enforcement process, during which the violation may continue to go unabated.
3. The current enforcement process is a system where an individual who violates the zoning ordinance receives a criminal conviction. The primary goal of zoning enforcement actions is to achieve compliance, and the possibility of admitting criminal liability, or being convicted of a misdemeanor, can hamper enforcement efforts. As can be seen in the effective use of civil penalties for Erosion and Sediment Control violations, there is a greater likelihood that individuals will cooperate with enforcement agencies when the potential liability is a civil penalty rather than a criminal conviction. In addition, the adoption of a civil penalty approach would still allow for the use of a criminal penalty for those individuals who violate the zoning ordinance on numerous occasions and are not deterred by a civil fine.
4. The adoption of civil penalties will result in procedural changes that should help to make the enforcement process more efficient. The current process requires (1) that Code Enforcement officers go to the magistrate's office to request the issuance of a criminal summons and (2) the summons to be served by a member of the Hanover County Sheriff's Office (if the individual resides within Hanover County) or, if the person lives outside the County or is a corporate entity that has its registered agent located outside Hanover County, by the sheriff's office in that other locality (which takes additional time and creates procedural issues if the summons is not served in a timely manner). In a system based on civil penalties,

the County Attorney's Office would take primary responsibility for filing the necessary pleadings with the Court, for ensuring that the summons is served on the defendant (which could include the use of private process servers for those outside the County, which would constitute a considerable time and monetary savings), and for scheduling the date of a trial.

5. The use of civil penalties would also result in the more effective prosecution of violators. The rules of evidence, including the burden of proof, are different in criminal proceedings than they are in civil proceedings. The civil burden of proof, which is a "preponderance of the evidence" rather than "beyond a reasonable doubt," matches the burden of proof in proceedings before the board of zoning appeals. In addition, in a civil proceeding the decision of the board of zoning appeals is used by the Court, which would restore the board of zoning appeals' role in the process and would eliminate most of the duplication that now exists in enforcement actions.
6. The adoption of civil penalties would not prohibit the Planning Department from seeking other civil enforcement mechanisms when appropriate. For example the Planning Department could seek a civil injunction in Circuit Court if the alleged violation is causing or constitutes a significant threat to public health.

#### **Attachments**

- ☒ Blackline of Existing Ordinance

## ORDINANCE 15-11

AN ORDINANCE TO AMEND THE HANOVER COUNTY CODE, CHAPTER 26, ZONING ORDINANCE, BY AMENDING SECTIONS 26-347, 26-348, AND 26-349, AND BY RELOCATING THE PROVISIONS OF CURRENT SECTION 26-349 INTO A NEW SECTION NUMBERED 26-350, TO PROVIDE THAT VIOLATIONS OF THE HANOVER COUNTY ZONING ORDINANCE SHALL BE PUNISHED BY A CIVIL PENALTY, IN ACCORDANCE WITH THE FOLLOWING:

1. THE AMOUNT OF THE CIVIL PENALTY SHALL BE TWO HUNDRED DOLLARS (\$200.00) FOR AN INITIAL VIOLATION AND FIVE HUNDRED DOLLARS (\$500.00) FOR SUBSEQUENT VIOLATIONS,
2. CIVIL PENALTIES SHALL NOT BE USED FOR VIOLATIONS THAT:
  - a. RESULT IN INJURY TO ANY PERSON,
  - b. ARE FOR ACTIVITIES RELATED TO LAND DEVELOPMENT, OR
  - c. ARE RELATED TO THE POSTING OF SIGNS ON PUBLIC PROPERTY OR PUBLIC-RIGHTS, OF WAY.
3. CIVIL PENALTIES SHALL BE IN LIEU OF CRIMINAL PENALTIES, EXCEPT FOR THOSE VIOLATIONS WHICH ARE LISTED ABOVE AS EXEMPT FROM CIVIL PENALTIES AND IN THOSE SITUATIONS WHERE THE AMOUNT OF CIVIL PENALTIES FOR A REPEATED VIOLATION EXCEED FIVE THOUSAND DOLLARS (\$5,000.00)

WHEREAS the Hanover County Zoning Ordinance contains regulations for the use of property within Hanover County and provisions for how violations of the Zoning Ordinance are to be punished; and

WHEREAS with the exception of certain provisions related to signs and screening requirements, the Zoning Ordinance currently provides that violations are to be punished as criminal misdemeanors, in accordance with the provisions of Section 15.2-2286 of the Code of Virginia; and

WHEREAS the Hanover County Board of Supervisors has a long-established policy to focus enforcement efforts on ways to bring properties in violation into compliance with the provisions of the Zoning Ordinance in an efficient manner; and

WHEREAS the Board finds that the current enforcement structure (1) is not the most effective mechanism through which to encourage property owners or other violators to correct outstanding violations, (2) does not fully utilize the expertise of the Hanover County Board of

Zoning Appeals, and (3) provides procedural hurdles which create unnecessary costs and delays to the enforcement process; and

WHEREAS Section 15.2-2209 of the Code of Virginia provides that the provisions of a local zoning ordinance can be enforced through the use of civil penalties rather than criminal penalties; and

WHEREAS the Code of Virginia provides that a local governing body that adopts the use of civil penalties shall establish a uniform schedule of civil penalties for violations of specified provisions of the locality's zoning ordinance; and

WHEREAS the Hanover County Planning Department and the Hanover County Attorney's Office, who investigate and prosecute zoning violations, have determined that the use of civil penalties will further the Board of Supervisors' stated policy regarding enforcement, will result in a more effective enforcement procedure, and will result in efficiencies that will benefit the citizens of Hanover County;

WHEREAS the Board has determined that the adoption of civil penalties for violations of the Zoning Ordinance is consistent with its policy and will help to ensure that the regulations contained in the Zoning Ordinance are applied in a consistent and fair manner; and

WHEREAS the Board of Supervisors finds that the public necessity, convenience, general welfare and good zoning practice require that the Zoning Ordinance be amended in accordance with these findings;

NOW, THEREFORE, BE IT ORDAINED by the Board of Supervisors of Hanover County:

1. That the Hanover County Code, Zoning Ordinance, Section 26-347, regarding violations of the provisions of the Zoning Ordinance, shall be amended to read as follows:

**Section 26-347. - Violation of provision of Zoning Ordinance; notice of violation.**

(a) Any person, whether the owner, lessee, principal, agent, employee or otherwise, who violates or fails to comply with any of the provisions or requirements of this Zoning Ordinance including, but not limited to, provisions of the district regulations, proffers accepted by the Board, or conditions of approval imposed by the Board, or the improvement, development or alteration of any site in violation of any plan approved pursuant to this Article, shall be subject to the following:

- (1) A civil penalty, as provided for in Section 26-348; or

- (2) Criminal penalties, as provided for in Section 26-349, when:
  - a. The amount of civil penalties for a series of violations arising from the same set of operative facts exceeds five thousand dollars (\$5,000.00), or
  - b. A violation results in injury to any person.

(b) If the zoning administrator determines that a violation of the Zoning Ordinance has occurred, a notice of violation shall be issued to a person or entity responsible for such violation; provided that a notice of violation shall not be required when the zoning administrator or his designee issue a ticket as set forth in Section 26-348. A notice of violation shall include the following information:

- (1) the date of the notice;
- (2) the basis for the decision;
- (3) a statement informing the recipient that the decision may be appealed to the board of zoning appeals within applicable appeal period and that the decision shall be final and unappealable if it is not timely appealed; and
- (4) the time within which the violation shall be abated.

The notice shall be either hand delivered, posted on the door of a building on the site, or mailed by regular or certified mail, provided that notice to the property owner, sent by certified mail to, or posted at, the last known address of the property owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall satisfy the notice requirements of this section. In addition, if the notice of violation is issued to a person other than the property owner, a copy of the notice shall also be sent to the owner of the property.

2. That the Hanover County Code, Zoning Ordinance, Section 26-248, regarding civil penalties, shall be amended to read as follows:

**Section 26-348. - Civil penalties.**

(a) Any person who violates or fails to comply with any of the provisions or requirements of the Zoning Ordinance as set described in Section 26-347 shall be subject to a civil penalty of two hundred dollars (\$200.00) for the initial summons or ticket, and a civil penalty of five hundred dollars (\$500.00) for each additional summons or ticket arising from the same set of operative facts..

(b) Proceedings seeking civil penalties for all violations of the Zoning Ordinance shall commence either by the filing of a civil summons in the general district court or by issuance of a ticket by the zoning administrator or his designee. A ticket shall only be issued when, in the judgment of the zoning administrator or his designee, the violation can be corrected immediately and the violator has failed to do so after being given a reasonable opportunity to do so.

(c) Each day during which any violation exists shall constitute a separate offense. However, in no event shall any such violation arising from the same set of operative fact be charged more frequently than once in any ten-day period, nor shall a series of such violations arising from the same set of operative facts result in civil penalties which exceed a total of five thousand dollars (\$5,000.00).

(d) The designation of a particular violation of this Ordinance as a violation punishable by a civil penalty shall be in lieu of criminal sanctions and except for any violation resulting in injury to any person or persons or where the amount of civil penalties for a series of violations arising from the same set of operative facts has exceeded five thousand dollars (\$5,000.00); such designation shall preclude the prosecution of a violation as a criminal misdemeanor.

(e) A civil summons or ticket issued shall contain the following information:

1. The name and address of the person charged.
2. The nature of the violation and the Ordinance provision(s) being violated.
3. The location, date and time that the infraction occurred or was observed.
4. The amount of the civil penalty assessed for the violation.
5. The manner, location and time in which the civil penalty may be paid to the County.
6. The right of the recipient of a civil summons to elect to stand trial for the violation, and either the date scheduled for such trial or the date for scheduling of such trial by the court.

(f) The summons or ticket shall provide that any person summoned for a violation may elect to pay the civil penalty by making an appearance in person or in writing by mail to the Hanover County Treasurer's Office at least seventy-two (72) hours prior to the time and date fixed for trial and, by such appearance, may enter a waiver of trial, admit liability, and pay the civil penalty established for the offense charged. Such summons shall provide that a signature to an admission of liability shall have the same force and effect as a judgment of court; however, an admission shall not be deemed a criminal conviction for any purpose.

(g) If a person charged with a violation does not elect to enter a waiver of trial and admit liability, the violation shall be tried in the General District Court in the same manner and with the same right of appeal as provided by law. A finding of liability shall not be deemed a criminal conviction for any purpose.

(h) The total civil penalties from a series of violations arising from the same set of operative facts shall not exceed five thousand dollars (\$5,000.00). After the civil penalties reach the five thousand dollar (\$5,000.00) limit, the violation may be prosecuted as a criminal misdemeanor under Section 26-349.

(i) If the violation remains uncorrected at the time of the admission of liability or finding of liability, the Court may order the violator to abate or remedy the violation in order to comply with the Zoning Ordinance. Except as otherwise provided by the Court for good cause shown, any such violator shall abate or remedy the violation within a period of time as determined by the Court, but not later than six months of the date of admission of liability or finding of liability. Each day during which the violation continues after the Court-ordered abatement period has ended shall constitute a separate offense.

(j) Civil penalties are in lieu of criminal penalties. A violation enforced under this section and Section 26-347 shall be in lieu of any criminal penalty except as provided in Section 26-347(a)(1) and, except for any violation resulting in injury to any person, such a



designation shall preclude the prosecution of the particular violation as a criminal misdemeanor. The remedies provided for in this Section are otherwise cumulative and not exclusive and shall be in addition to any other remedies provided by law.(k) This section shall not be construed to allow the imposition of civil penalties for

1. Activities related to land development where, for the purposes of this section, the term “land development” means a human-made change to, or construction on, the land surface including, but not limited to, land disturbing activity within the meaning of chapter 10 of the Hanover County Code or the construction of buildings, structures or improvements under an approved site plan or subdivision plat, but does not mean the land development project’s compliance with this chapter; and
  2. The violation of any provision of the Hanover County Code relating to the posting of signs on public property or public rights-of-way.
3. That the Hanover County Code, Zoning Ordinance shall be amended by the insertion of a new section, to be numbered Section 26-349 after adoption of this ordinance, regarding criminal penalties for zoning violations, shall be amended to read as follows:

**Section 26-349 Criminal penalties**

Any person who violates or fails to comply with any of the provisions or requirements of the Zoning Ordinance as set described in Section 26-347 and:

1. the violation or failure to comply results in injury to any person, or
2. the violation or failure to comply occurs after the five thousand dollar (\$5,000.00) maximum aggregate civil penalty provided in Section 26-347 has been reached,

shall have committed a misdemeanor offense punishable by a fine of not less than ten dollars (\$10.00) nor more than one thousand dollars (\$1,000.00). If the violation is uncorrected at the time of conviction, the court shall order the person convicted to abate or remedy the violation in compliance with this chapter, within a time period established by the court. Failure to remove or abate such violation within the time period established by the court shall constitute a separate misdemeanor offense punishable by a fine of not less than ten dollars (\$10.00) nor more than one thousand dollars (\$1,000.00), and any such failure during any succeeding ten (10) day period shall constitute a separate misdemeanor offense for each ten (10) day period, punishable by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand five hundred dollars (\$1,500.00).

4. That the Section 26-349 of the Hanover County Zoning Ordinance, titled “Reconsideration of order, requirement, decision or determination,” which was in effect prior to the adoption of this Ordinance shall be renumbered to Section 26-350, but the provisions of the section shall not be otherwise amended.
5. That this ordinance shall be effective on January 1, 2016.